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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-815

PHILIP A. DIORIO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

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No.

PHILIP A. DIORIO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Philip A. Diorio, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, described *infra*.

Opinion Below

The opinion of the Court of Appeals, printed in the appendix hereto, *infra*, is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on November 19, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Question Presented

In a criminal prosecution for bankruptcy false-swearing (18 U.S.C. §152), where the statutorily prescribed specific criminal intent is "knowingly and fraudulently", is it a violation of substantive due process of law under the Fifth Amendment to allow conviction and imprisonment of a defendant-bankrupt upon a trial record which indisputably lacks any proof of any intent by the defendant to commit any actual fraud against anyone; is not such use of the statute, "unduly oppressive upon individuals" as a matter of substantive due process of law (*Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594-595)?

Constitutional Provision and Statute Involved

The case involves the Fifth Amendment due process clause, in both the substantive and procedural aspects. It also involves 18 U.S.C. §152, which reads in pertinent part:

* * * * *

> "Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding; * * *.
>
> * * * * *
>
> Shall be fined not more than $5000 or imprisoned not more than five years, or both."

Statement of the Case

This petition seeks review of a judgment of the United States Court of Appeals for the Second Circuit which affirmed a judgment of the United States District Court for the Southern District of New York (Mansfield, D.J. and a jury) convicting petitioner of bankruptcy false swearing (in his own bankruptcy proceedings) and sentencing him to three months imprisonment and a fine of $1000.00 (18 U.S.C. §152).

Commencing in the early 1960s, petitioner, who is a civil engineer, together with his brother Thomas Diorio, was in the concrete construction contracting business. Their first company was called "Elite", in which the two brothers shared equal ownership. In 1962 Elite made an assignment for benefit of creditors, and petitioner personally assumed the very heavy financial obligations of Elite as a voluntary moral obligation. The Diorio brothers then formed a new company called the "D" Concrete Construction Corp. (hereinafter "D"C.C.C.), which purchased Elite's equipment and paid Elite's payroll obligations.* The set-up in this new "D"C.C.C. venture of the Diorio brothers was that, as in Elite, they were 50/50 owners initially, but later, in 1963, as "D"C.C.C.'s affairs developed unfavorably, petitioner and his brother agreed verbally that the brother (Thomas) take over 100% interest in "D"C.C.C., as petitioner's voluntarily assumed obligations on behalf of Elite were an obstacle for "D"C.C.C. in the eyes of persons with whom

* For the facts as to this transition from Elite to "D"C.C.C., see *In re Diorio*, 297 F.Supp. 842, 843 (S.D.N.Y. 1968), affirmed 407 F. 2d 1330 (C.A. 2, 1969), dealing with a herein related phase of petitioner's civil bankruptcy proceedings.

"D"C.C.C. was doing business. Meanwhile, also in 1963, petitioner's brother Thomas and one Louis Schein formed a new company called Diorio Construction Corp., with petitioner as general manager. This new Diorio Corp. purchased equipment from "D"C.C.C.; the new Diorio Corp. likewise did not fare well, and it became defunct around the end of 1965.

In November 1965 petitioner personally filed for bankruptcy. His bankruptcy "statement of affairs" listed his former interest in Elite, but not in "D"C.C.C.; nor did it list the above mentioned Diorio Corp. which had succeeded "D"C.C.C. In January 1966, in the bankrupcty proceedings, petitioner filed an affidavit denying that he had had an ownership interest in "D" Construction Corp., which was apparently a misnomer for "D"C.C.C. ("D" Concrete Construction Corp.), or in Diorio Construction Corp. In December 1966 petitioner testified before the Bankruptcy Referee that he had had a 50% interest in "D"C.C.C. but no ownership interest in Diorio Construction Corp.

The above initial omission of "D"C.C.C. from the "statement of affairs" in November 1965, and the above affidavit initially denying petitioner's interest in "D" Construction Corp. in January 1966—all corrected by petitioner in his above-mentioned testimony in December 1966 before the Bankruptcy Referee—are the basis of the present indictment against petitioner for bankruptcy false swearing. This indictment was filed in September 1970.

Meanwhile, as indicated in our last preceding footnote, litigation had taken place in petitioner's bankruptcy proceedings, involving petitioner's relations with "D"C.C.C.

and Diorio Construction Corp. That bankruptcy litigation arose upon a creditor's objections to petitioner's bankruptcy discharge, on the ground *inter alia* that he had fraudulently concealed an interest in "D"C.C.C. and in Diorio Construction Corp. The Bankruptcy Referee, Asa S. Herzog, dismissed these creditors' objections, but District Judge Mansfield reversed the Referee, concluding that petitioner had acted fraudulently in order to conceal assets from creditors in regard to "D"C.C.C. and Diorio Construction Corp., and criticizing petitioner severely as to his veracity and his honesty in the bankruptcy proceedings with regard to those companies. *In re Diorio*, 297 F.Supp. 842 (S.D.N.Y. 1968), affirmed 407 F.2d 1330 (C.A. 2, 1969). Judge Mansfield also expressed strong disapproval and suspicions concerning other aspects of petitioner's conduct in the bankruptcy proceedings, including his alleged attempts to thwart the locating of one Catherine Gerber, the Diorio Brothers' bookkeeper; and including also petitioner's involvements with a company called Columbus Construction Corp., organized in Puerto Rico in October 1965 following the demise of Diorio Construction Corp. (*ibid*).

Evidently acting under the spur of Judge Mansfield's aforesaid 1968 severe condemnation of petitioner, in which the Court of Appeals had joined in the above cited 1969 affirmance of Judge Mansfield's denial of bankruptcy discharge, the United States Attorney for the Southern District of New York had petitioner indicted for bankruptcy false swearing in September 1970, this being the within indictment.

However, and despite the multiple and very grave imputations against petitioner's veracity and financial integ-

rity as stated by Judge Mansfield and the Court of Appeals in the above civil bankruptcy litigation, this criminal prosecution against petitioner became washed down to the single item of his initial non-disclosure of his interest in "D"C.C.C. The indictment herein speaks only of these initial "D"C.C.C. omissions or denials and includes no charges concerning the Catherine Gerber item, or Diorio Construction Corp., or Columbus Construction Corp., or concerning any of the other imputational malefactions of petitioner as spoken of by Judge Mansfield and the Court of Appeals in the above described civil bankruptcy litigation.*

And at the trial of this indictment the case became washed down even more, as it turned out that even on the sole indictment item of petitioner's initial omission or denial of his "D"C.C.C. interest, the trial proofs were uncontradicted that petitioner never had or could have had any actual fraudulent intent in his initial incorrect conduct concerning "D"C.C.C., because neither "D"C.C.C. itself nor any of the successor companies of the Diorio brothers had ever developed any assets of which any bankruptcy creditor had been deprived or could have been deprived. The trial proofs herein also established uncontradictedly that petitioner never had any ownership interest in any of the successor companies of "D"C.C.C. Petitioner testified in this trial uncontradictedly that his initial omission or denial of his "D"C.C.C. interest had come about partly because "D"C.C.C. simply had not entered his mind at the times in question because it had long been defunct, had no assets,

* These judicial imputations against petitioner by Judge Mansfield and the Court of Appeals in the civil bankruptcy litigation in 1968-1969 have turned out to be premature and unfounded.

and his own interest therein had been turned over to his brother Thomas in 1963; and because "D"C.C.C. had been misnomered, in the January 1966 affidavit, as "D" Construction Corp.*

In these circumstances, that is, with the trial proofs herein thus having practically vaporized the Government's case of "fraudulent" false swearing in regard to "D"C.C.C., the prosecution prevailed upon the Trial Judge to allow a mass of testimony about petitioner's alleged "course of conduct" in regard to successor companies of "D"C.C.C., and about petitioner's alleged obstruction of the bankruptcy creditors' efforts to locate the bookkeeper Catherine Gerber, none of which the Government had seen fit to include as charges in this indictment. As to the "course of conduct" proofs in regard to successor companies—which the Trial Judge allowed on the issue of intent or motive, we categorically state that there was actually nothing in those proofs to justify any inference that petitioner ever had any ownership interest in those successor companies. As regards the Catherine Gerber proofs, we likewise categorically state that there was absolutely no probative tie-in with any permissible inference of fraudulent intent or ill-motivated obstruction vis-a-vis the bankruptcy creditors.

In short, this trial produced no inculpatory proof against petitioner whatever except that he had in fact initially omitted and denied his interest in "D"C.C.C.—an interest,

* It is undisputed that this misnomer stems from the Bankruptcy Trustee himself, the affidavit containing the misnomer having been drawn by petitioner's bankruptcy attorney, and the whole matter of the affidavit having been handled by long distance telephone and by mail between the attorney and petitioner (who was then residing in Puerto Rico).

an omission and a denial which, the trial proofs show, were utterly without any criminal or any other sinister significance for the purposes of a prosecution under 18 U.S.C. §152 for bankruptcy false swearing.

In the above posture of the trial proofs the dispositive issue became, whether the Government had proved the requisite criminal intent under 18 U.S.C. §152—"knowingly and *fraudulently*". Unfortunately, the defense in this trial did not request a jury instruction that proof of intent in this case required proof that the defendant intended actual fraud; instead, the case law precedents on the subject being what they are—all of them are lower court precedents (*infra*)—defense counsel requested the Trial Court to instruct the jury that "fraudulently", under 18 U.S.C. §152, means "with intent to deceive," and that is how the Trial Court instructed our jury (A-15*). Consequently it became necessary, in the appeal in the Court below, for petitioner to invoke the plain error rule on this question of the meaning of fraudulent intent under 18 U.S.C. §152; and we are likewise obliged to invoke the plain error rule here, as the means of opening up for certiorari consideration the important question of whether, notwithstanding the lower Court case law precedent (*infra*), the specific statutory intent under 18 U.S.C. §152 ("knowingly and fraudulently") requires proof that a defendant intended actual fraud of bankruptcy creditors, at least in a case like the present one where the record absolutely negates any intent or even any possibility of actual fraud and where in all other respects the case of alleged bankruptcy false swearing is so insubstantial if not indeed merely trivial and petty.

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* "A- " refers to the Appellants Appendix in the Court below.

The jury convicted petitioner on one count of bankruptcy false swearing based on his omission of his "D"C.C.C. interest from the "statement of affairs" and one count of bankruptcy false swearing based on his affidavit denying an ownership interest in the misnomered "D" Construction Corp.

The Court of Appeals affirmed the conviction.

Reasons for Granting the Writ

The bankruptcy false swearing statute here involved, 18 U.S.C. §152, is of course one of the most important and salutary instrumentalities of Federal law enforcement for the business life of this country. We—petitioner and counsel herein—recognize that the need for preserving truthfulness and honesty of full disclosure of a bankrupt's assets or possible assets would not be well served by requiring the prosecution, in every case of bankruptcy false swearing, to prove beyond a reasonable doubt that the defendant intended actual fraud. But where, as here, the trial record not only falls short of such proof of intent of actual fraud, but affirmatively and conclusively negates any such intent and indeed even negates the possibility of any such intent, the substantive due process protections of the Fifth Amendment have to be considered:

The familiar test of "substantive due process of law" is that any offered exercise of governmental legislative power over life, liberty or property must not only be referable to an existing legislative power to deal with the subject matter, but also "it must appear, first, that the interests of the public * * * require such interference; and,

second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." *Lawton* v. *Steele,* 152 U.S. 133, 137 (1894), quoted with approval in *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590, 594-595 (1962) as being "still valid today."

It is difficult to think that the legislators of 18 U.S.C. §152 ever contemplated that this statute, aimed at grave evils and carrying a penalty of imprisonment, would ever be used against a citizen in the petty and unjust manner which we respectfully claim has been the case here.

This statute, as applied in the present prosecution, seems to us to work a classic violation of substantive due process of law as above defined. Can it be seriously contended here that—in the above quoted words of *Lawton* v. *Steele*—"the interests of the public require" such an application of the statute, or "the means [the statute as here applied] are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive"?

There are several lower court precedents to the effect that "knowingly and fraudulently" in bankruptcy false swearing does not require proof of intent of actual fraud, but only one of those precedents, *United States* v. *Cury,* 313 F. 2d 337 (C.A. 3, 1963), was a criminal prosecution; all of the other precedents of this category arose in civil bankruptcy proceedings on creditors' objections to discharge of the bankrupt (*infra*) (11 U.S.C. §32 (c)). Even in the *Cury* case, where the Court does speak of false oaths in bankruptcy as being punishable irrespective of whether there was an intent to injure or defraud creditors, the jury instruction actually given and affirmed in that case was

"a wilful intent to defeat and defraud creditors", and nowhere in the *Cury* opinion does one find the words "with intent to deceive" (the instruction given in our case). The civil bankruptcy precedents above referred to, in which proof of intent is held not to require proof of intent of actual fraud, apparently commence with *In re Slocum*, 22 F. 2d 282, 285 (C.C.A. 2, 1927). *Slocum* was followed in *In re Marshall*, 47 F. 2d 209, 210 (C.C.A. 2, 1931). However, in *In re Steinberg*, 142 F.2d 942, 943 (C.C.A. 2, 1944) Judge Frank, for the Court, said:

> "* * * The only question is whether the oath was 'fraudulently made'. We would be inclined to say no, if this were a case of first impression; as the bankrupt had no assets, * * * and it is difficult to perceive any fraudulent purpose, * * * in those omissions * * *. [But] we bow to the precedents which, in practical effect, have read the word 'fraudulently' out of the statute by the use of the phrase, 'an intentional untruth in a matter material to the issue which is itself material'." (citing *Slocum* and *Marshall*)

Judge Learned Hand, who sat in the above *Steinberg* case, and joined in the above rueful remarks of Judge Frank about how the word "fraudulently" had "in practical effect" been "read out of the statute", had sat also in the *Slocum* and *Marshall* cases. Judge Chase, who also sat in the above *Steinberg* case and joined in Judge Frank's opinion, had written the opinion in the *Marshall* case.

To the same effect as *Slocum* and *Marshall*, yet also revoicing the doubts or regrets of *Steinberg*, see *Morris Plan Industrial Bank* v. *Finn*, 149 F. 2d 591, 592 (C.C.A. 2, 1945), where Judge Learned Hand again sat, and where the *per curiam* opinion unmistakably is in the unique literary style

of Judge Learned Hand. See also *Tancer* v. *Wales*, 156 F. 2d 627, 628 (C.C.A. 2, 1946) where, again, and with Judge Learned Hand again on the bench, the Court re-noted the same doubts about the *Slocum-Marshall* rule, but this time in a much more resigned spirit.

We submit it is one thing to "read the word 'fraudulently' out of the statute" for the purpose of *civil* bankruptcy proceedings on creditors' objections to discharge, but that it is quite another thing for Courts thus to rewrite a *criminal* statute like 18 U.S.C. § 152 by reading out of such statute the very heart and soul of the Congressional definition of the specific statutory criminal intent requiring proof not only that a defendant acted "knowingly" but also ("and") "fraudulently".

At the very least, we urge, any such reading-out of the word "fraudulently" from this *criminal* statute cannot constitutionally be justified on a literally indiscriminate basis in disregard of particular criminal trial proofs in which proof of intent of actual fraud is absolutely negated on the particular record facts. To read out of this criminal statute the word "fraudulently" in such a case, is to violate substantive due process of law; it is to make the impingement of the statute "unduly oppressive upon individuals" (see *Lawton* and *Goldblatt, supra*).

This Court has apparently never ruled on the question of fraudulent intent in bankruptcy-false swearing even in a civil case. And, as seen, there is apparently only one criminal case dealing with this question (and, at that, only tangentially) even in the lower Federal Courts (*Curg, supra*).

The general importance of this question for Federal criminal law enforcement, indeed for Federal "Public Law" both criminal and civil in the largest sense, plus its importance for the purposes of ensuring to our individual citizen petitioner herein the justice and the beneficence of the substantive due process protections of the Fifth Amendment, are believed to merit the granting of a writ of certiorari in this case.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB P. LEFKOWITZ
ABRAHAM GLASSER
Attorneys for Petitioner
Philip A. Diorio

APPENDIX

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 259—September Term, 1971.

(Argued October 29, 1971 Decided November 19, 1971.)

Docket No. 71-1731

UNITED STATES OF AMERICA,

Appellee,

v.

PHILIP A. DIORIO,

Defendant-Appellant.

Before:

LUMBARD, HAYS and OAKES,

Circuit Judges.

Appeal from a judgment of conviction after jury trial in the United States District Court for the Southern District of New York, Walter R. Mansfield, *Judge*, on two counts of making a false oath in a bankruptcy proceeding in violation of 18 U.S.C. §152.

Affirmed.

JACOB P. LEFKOWITZ, New York, New York, *for Appellant.*

SHIRAH NEIMAN, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York; Walter S. Rowland, Assistant United States Attorney, of counsel), *for Appellee.*

PER CURIAM:

We affirm the conviction of appellant under 18 U.S.C. §152 on one count charging him with making a false oath on a material matter in a bankruptcy proceeding and a second count charging him with making a false oath in an affidavit in the same proceedings. The "Statement of Affairs" annexed to appellant's petition in bankruptcy failed to disclose any interest of his in "D" Concrete Construction Corporation, and appellant's subsequent affidavit denied any interest in "D" Construction Corporation. In fact, for two years appellant had had a 50 per cent interest in, and had been president of, "D" Concrete Construction Corporation.

The evidence plainly supported the conviction. With respect to the count for failure to disclose, appellant claimed a loss of memory because the "D" Concrete Construction Corporation had been out of business for two years before the "Statement of Affairs" was filed. Appellant had, however, listed on his statement the Elite Construction Corporation, another defunct company which had transferred certain assets to "D," indicating a clear awareness on his part of the necessity of listing defunct corporations in which he had interests. In respect to the affidavit count appellant claimed that his affidavit was true in that the interest he had had was really in "D" *Concrete* Construc-

tion Corporation, *i.e.*, that there was no "D" *Construction* Corporation. But in the very affidavit in which he swore that he had had no interest in "D" Construction Corporation (or another corporation, not relevant here) appellant also said, "The principal officer, stockholder and director of both of the aforesaid corporations is my brother Thomas Diorio. . . ." Since there never was a "D" Construction Corporation, the jury was entitled to believe—as the Government argued—that if appellant thought his brother was an officer and stockholder in "D" Construction Corporation, he must also have thought that the name stood for "D" *Concrete* Construction Corporation (perhaps as a result of a mistake on the part of his attorney, who prepared the affidavit while appellant was in Puerto Rico). Thus, his statement that he had no interest in the corporation was correctly labeled false by the jury.

Proof of later similar acts in the nature of falsely denying his interest in other companies was admissible against appellant, in the trial court's discretion, for the limited purpose of showing his willful intent and motive. *Metheany* v. *United States*, 390 F.2d 559, 563 (9th Cir.), *cert. denied*, 393 U.S. 824 (1968); *United States* v. *Knohl*, 379 F.2d 427, 438-39 (2d Cir.), *cert. denied*, 389 U.S. 973 (1967); *United States* v. *Blount*, 229 F.2d 669, 671-72 (2d Cir. 1956); *see* 2 J. Wigmore, Evidence §§302, 340, 371 (3d ed. 1940).

The court's charge regarding appellant's recantation simply left to the jury the question whether the recantation was "prompted by an honest discovery of an earlier mistake" on the one hand or, on the other hand, "by the realization that the jig was up and that the falsity had already been uncovered or was about to be uncovered by

others." This charge was proper in light of evidence that the Referee had asked appellant's attorney to submit the affidavit and a year later had asked appellant to appear for further interrogation, at which time disclosure of appellant's half ownership was made. Because a recantation does not in and of itself cure an original false statement under oath, *United States* v. *Norris*, 300 U.S. 564, 573 (1936), the court necessarily had to explain the possible inferences.

The court's charge, in accordance with defendant's request to instruct the jury that "fraudulently" means with intent to deceive, was clearly not "plain error" within Fed. R. Crim. P. 52(b). *In re Slocum*, 22 F.2d 282, 285 (2d Cir. 1927); *cf. Morris Plan Indus. Bank* v. *Finn*, 149 F.2d 591, 592 (2d Cir. 1945). The materiality of a statement concerning the possible assets of a voluntary bankrupt is obvious. *Metheany* v. *United States*, *supra*.

Appellant did not maintain on oral argument or incorporate as an argument in his brief the allegation, made in the brief's "Statement of the Case," that, because the trial court had upheld a creditor's objections to appellant's discharge in the civil bankruptcy proceeding, it had "prejudged" the criminal case. Appellant's motion to disqualify was made under the gun of immediate trial by counsel who had been in the case for four months. The civil case was *In re Diorio*, 297 F. Supp. 842 (S.D.N.Y. 1968), a decision upheld by this court in a *per curiam* opinion referring to the trial court's opinion as "temperate." *Diorio* v. *Kreisler-Borg Construction Co.*, 407 F.2d 1330 (2d Cir. 1969). No affidavit alleging bias or prejudice was filed under 28 U.S.C. §144, and there is no indication that the issue was seriously pressed below; nevertheless we note that a trial judge is equally obligated *not* to recuse himself when the facts do

not give fair support to a charge of prejudgment, as he is to excuse himself when the facts warrant such action. *United States* v. *Tropiano*, 418 F.2d 1069, 1077 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970) (trial judge's presiding at bail hearing where defendants' criminal records disclosed no grounds for disqualification). A diligent search of the record and transcript fails to reveal any indication of any bias or prejudice demonstrated by the trial judge, which perhaps explains why the issue was to all intents and purposes abandoned in this court, if not below as well.

Judgment affirmed.

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of November one thousand nine hundred and seventy-one.

Present:

HON. J. EDWARD LUMBARD
HON. PAUL R. HAYS
HON. JAMES L. OAKES
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

PHILIP A. DIORIO,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A true copy,

A. DANIEL FUSARO
Clerk

[SEAL]